

89-326

Supreme Court, U.S.

FILED

AUG 24 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

No. \_\_\_\_\_

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

\_\_\_\_\_  
DORMAN O. YOUNG, d/b/a TIFFANY'S,  
*Petitioner*

v.

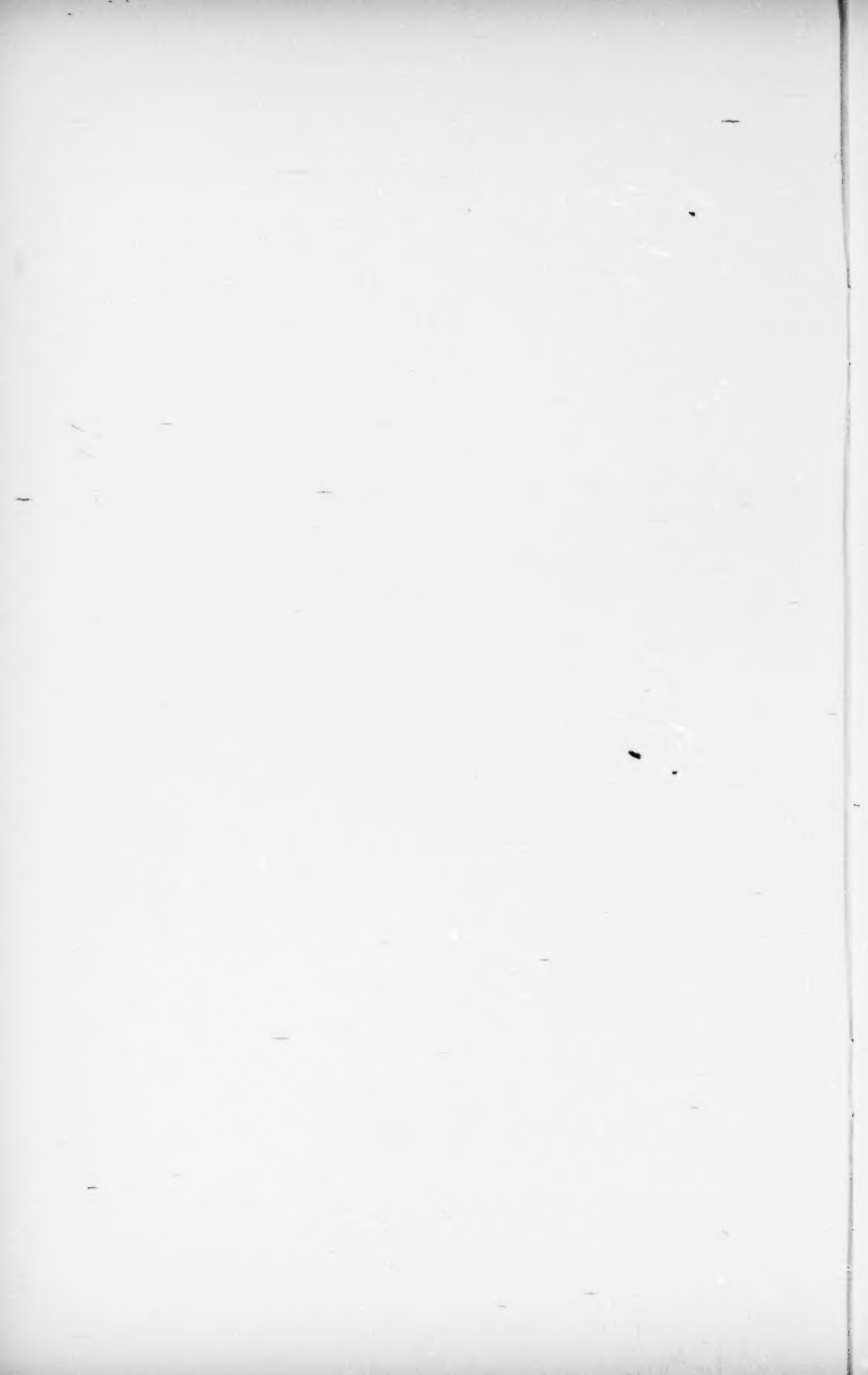
MOUNT HAWLEY INSURANCE COMPANY and  
ST. KATHERINE INSURANCE COMPANY PLC,  
*Respondents*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

\_\_\_\_\_  
D. SCOTT HICKAM \*  
LYNN WILLIAMS  
HICKAM AND WILLIAMS, P.A.  
P.O. Box 6137  
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*Counsel for the Petitioner*

August 24, 1989

\* Counsel of Record



## QUESTIONS PRESENTED

Was the Court of Appeals wrong in finding that the record on appeal was void of a Motion for Directed Verdict on the Issue of Damages and therefore in error in affirming the trial court's denial of the petitioner's motion for j.n.o.v. on that basis?

If the Court of Appeals was correct in finding that the record on appeal was void of a Motion for Directed Verdict on the Issue of Damages was it error for the Court to raise the issue on its own for the first time on appeal?

### LIST OF PARTIES

Petitioner is Dorman O. Young. He is an individual residing in Garland County, Arkansas. He did business as a sole proprietorship known as Tiffany's.

Respondents are corporations namely, Mount Hawley Insurance Company, a Delaware corporation and St. Katherine Insurance Company, PLC, a corporation of London, England.

Joe Noga was an individual. He was sued by the Respondents in a third party action. The United States Court of Appeals, Eighth Circuit, dismissed him as a party for lack of service sua sponte, in a preliminary opinion, see *Young v. Mt. Hawley Ins. Co.*, 64 F.2d 81 (Eighth Circuit 1988). Joe Noga is not named in the case's caption.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

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No. \_\_\_\_\_  
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DORMAN O. YOUNG, d/b/a TIFFANY'S,  
v. *Petitioner*

MOUNT HAWLEY INSURANCE COMPANY and  
ST. KATHERINE INSURANCE COMPANY PLC,  
*Respondents*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**  
\_\_\_\_\_

TO: The Honorable, the Chief Justice and Associate  
Justices of the Supreme Court of the United States:

Dorman Young, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on April 25, 1989.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Eighth Circuit is unreported and is printed in the Appendix, *infra* page 1a. The judgment of the United States Court of Appeals for the Eighth Circuit is printed in the Appendix hereto, *infra* page 4a. The Journal Entry of the Judgment of the United States District Court for the Western District of Arkansas, Hot Springs Division is printed in the Appendix hereto, *infra* page 7a.

## JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered April 25, 1989. A timely petition for rehearing was denied on May 30, 1989. A timely petition for rehearing was denied on May 30, 1989 (Appendix, *infra*, page 6a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

## STATUTES INVOLVED

Arkansas Code Annotated 23-88-101

“(a) A fire insurance policy, in case of a total loss by fire of the property insured, shall be held and considered to be a liquidated demand and against the Company taking the risk, for the full amount stated in the policy, of the full amount upon which the company charges, collects or receives a premium.

(b) However, the provisions of this section shall not apply to personal property.”

Rules of the United States Court of Appeals for the Eighth Circuit Rule 7(2)

“All parties and counsel shall make every effort to prepare a concise record on appeal. The record should not include trial memoranda or briefs of law, or interlocutory motions or rulings, unless they bear directly on the issue(s) on appeal and then only to the extent necessary. Discovery material other than relevant deposition testimony that has not been incorporated in the transcript also should not be included in the designated record. Evidence produced by discovery may be referred to in the briefs with appropriate reference to any document in the original record. This Court will examine any original document if necessary to resolve any factual dispute relating to discovery material. This court may deny costs to a party who has caused the insertion of unnecessary material into the record of appeal. Moreover, any counsel who so multiplies the proceedings in any case as to increase costs unreasonably and



vexatiously may be required by the court to satisfy personally those excess costs, pursuant to 28 U.S.C. Section 1927, and may be subject to disciplinary sanctions.

**FRCP 50(b)**

"Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

**STATEMENT OF THE CASE**

This is a civil action filed in federal court, Federal Jurisdiction is based on 28 U.S.C. Section 1332, diversity of citizenship and an amount controversy in excess of \$10,000.00 (the 1986 required amount). Petitioner, Dorman Young, purchased an insurance policy from the respondents. Subsequently, a fire totally destroyed the insured property. After paying the mortgagee, the respondents refused to pay the petitioner on the defense of arson and misrepresentation.

After a jury trial, the jury found that the petitioner did not cause the fire nor did he misrepresent anything to the respondents. The jury awarded the petitioner \$102,000.00.

Petitioner timely moved for judgment notwithstanding the verdict pursuant to FRCP 50(b). The basis of the motion was that the damages issues were issues of law instead of fact due to Ark. Code Ann. 23-88-101. That statute requires insurance companies to pay the value of their policies on total losses to real property. Additionally, the facts presented at trial are undisputed as to the personal property coverage of the policy. The trial judge denied the motion.

Petitioner timely filed his appeal of the denial of the motion for judgment notwithstanding the verdict to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the trial court's denial of the Motion for Judgment Notwithstanding the Verdict. The Court of Appeals opinion stated that the record did not reflect a motion for directed verdict on the issue of damages by the petitioner, and therefore was not in compliance with FRCP 50(b). The Court of Appeals made this finding independently. The issue was neither argued or identified as an issue by either party at any stage of the proceedings. The joint appendix included the trial clerk's minutes indicating a directed verdict motion. Neither the trial judge nor the respondent ever asserted that the directed verdict motion was not properly made. Petitioner filed a Motion for Reconsideration which included the page of the joint appendix and a transcript of the oral directed verdict motion on the issue of damages. The Motion for Reconsideration was denied without comment.

#### **REASONS FOR GRANTING THE WRIT**

This writ should be granted as the United States Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of super-

vision. It is an absolute undisputed fact between the parties that the petitioner properly moved for a directed verdict on the issue of damages at trial.

In the response to the petitioner's Motion for Judgment Notwithstanding the Verdict, no challenge was made as to a proper directed verdict motion on the issue of damages. The trial court did not find that a directed verdict motion was not properly made.

In the joint appendix to the Court of Appeals, only the clerk's minutes reflecting the direct verdict motions were sent to evidence of the motions. The motions were not transcribed and sent as part of the record as they were not at issue and petitioner was seeking to comply with the Eighth Circuit Rule 7 to be concise. The first time the issue of a proper directed verdict motion was raised, it was raised by the Court of Appeals itself in its final opinion.

After receiving the judgment and opinion, petitioner filed a Motion for Reconsideration. He attached a copy of the joint appendix page reflecting the court clerk's minutes indicating the directed verdict motions and also included the transcribed directed verdict motions on the issue of damages. Petitioner confronted the Court of Appeals with their mistake in the Motion for Reconsideration. The Court of Appeals refused to correct this obvious error.

To allow this decision to stand is a miscarriage of justice. The Court of Appeals decision is based on an erroneous fact. That being that the record fails to reflect a proper directed verdict motion. The petitioner relied on the rules and had no reason to believe that the making of directed verdict motions on damages were at issue to require any further reflection in the appellate record than the clerk's minutes. The directed verdict motions on damages were made and there was no reason to clutter the record on appeal with this non issue. The present deci-

sion makes the damages question one of fact, and not law. The damages question is one of law, due to Ark. Code Ann. 23-88-101 and the undisputed facts at trial.

Additionally, the federal court is sitting as an Arkansas State Court. Its decision is the only exception to Ark. Code Ann. 23-88-101. This valued policy statute is steeped in public policy considerations in favor of the petitioner and other insurance policy holders.

### CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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(501) 624-4346  
*Counsel for the Petitioner*

August 24, 1989

\* Counsel of Record

# **APPENDIX**

APPENDIX



APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

---

No. 88-2469

---

DORMAN YOUNG d/b/a TIFFANY'S,  
*Appellant,*  
JOSEPH C. NOGA,

v.

MT. HAWLEY INSURANCE COMPANY;  
ST. KATHERINE INSURANCE COMPANY PLC,  
*Appellees.*

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Appeal from the United States District Court  
for the Western District of Arkansas

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Submitted: February 14, 1989

Filed: April 25, 1989

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Before WOLLMAN, Circuit Judge, and BRIGHT and  
HENLEY, Senior Circuit Judges.

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## PER CURIAM.

- Dorman Young obtained a jury verdict of \$102,000 in this diversity action for recovery of fire insurance proceeds. After the district court entered judgment on the jury verdict, Young sought by a motion for judgment n.o.v. to increase the award from \$102,000 to \$186,203.24, the latter figure allegedly representing the undisclosed amount of the loss covered by the fire insurance policy in issue. The district court denied the motion, and this appeal followed. We affirm.

The policy in question insured a restaurant owned by Young that was totally destroyed by fire in 1986. The policy covered the building for \$225,000 and its contents for \$75,000. On appeal, Young asserts that the Arkansas valued policy statute, Ark. Code Ann. § 23-88-101 (1987), required the insurer to pay the full face value of policy coverage for real property loss, less the \$113,796.76 the insurer had previously paid to the mortgagee on the building. Young also argues that he presented undisputed evidence of personal property loss exceeding the \$75,000 policy limit. In total, Young claims that Arkansas law and the undisputed evidence entitle him to recover \$186,203.24, an amount greater than the jury award.

Contrary to Young's assertion, however, the record on appeal does not indicate that he moved for a directed verdict on the issue of damages. A party may not move for a judgment n.o.v. without first having moved for a directed verdict at the close of all the evidence. *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); Fed. R. Civ. P. 50(b). Therefore, we must construe Young's post-trial motion as one for a new trial for inadequacy of damages or for a new trial unless the insurance companies consented to an additur. A request for such relief lies within the sound discretion of the trial court. In this case, the district court did not abuse its discretion by denying relief.



One Joseph C. Noga, a named insured under the policy, was not a party to the lawsuit. Although Noga had been named in the suit, he had not been served as a party.<sup>1</sup> In awarding damages in the manner in which the case was submitted, the jury may well have limited the award to the actual loss sustained only by Young and disregarded Noga's interest in the building and its contents inasmuch as Noga never appeared at trial and the sole interrogatory on damages did not mention him. Significantly, Young did not object to the form of the instructions and interrogatories submitted to the jury.

We conclude that the district court did not err in rejecting Young's post-trial motion, and we affirm.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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<sup>1</sup> In a previously filed opinion, *Young v. Mt. Hawley Ins. Co.*, 864 F.2d 81, 82-83 (8th Cir. 1988), this court ruled that the district court had entered a final appealable order notwithstanding Noga's absence as a served party to the lawsuit.

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 88-2469

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DORMAN YOUNG d/b/a TIFFANY'S,  
*Appellant,*  
JOSEPH C. NOGA,

vs.

MT. HAWLEY INSURANCE COMPANY;  
ST. KATHERINE INSURANCE COMPANY PLC,  
*Appellees.*

---

Appeal from the United States District Court  
for the Western District of Arkansas

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JUDGMENT

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This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties without oral argument.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

April 25, 1989

Appellees will recover from appellant the sum of \$55.17 for taxable costs on appeal.

5a

A true copy.

ATTEST:

/s/ Robert D. St. Vrain  
Clerk  
U.S. Court of Appeals  
Eighth Circuit

Mandate Issued: 6/9/89

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 88-2469WA

DORMAN YOUNG, ETC.,  
*Appellant,*  
vs.

MT. HAWLEY INSURANCE COMPANY, *et al,*  
*Appellees.*

---

Appeal from the United States District Court  
for the Western District of Arkansas

---

Appellant's petition for rehearing has been considered  
by the Court and is denied.

May 30, 1989

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain  
Clerk  
U.S. Court of Appeals  
Eighth Circuit

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
HOT SPRINGS DIVISION

---

No. 86-6105

DORMAN YOUNG d/b/a TIFFANY's and JOE NOGA,  
*Plaintiffs*

vs.

MT. HAWLEY INSURANCE COMPANY and  
ST. KATHERINE INSURANCE COMPANY PLC,  
*Defendants*

---

ORDER

In this action separate plaintiff, Dorman Young, has filed a motion for judgment notwithstanding the verdict as returned by the jury in favor of the plaintiff in the sum of \$102,000.00.

After a three-day jury trial and the Court's instructions to the jury as to the applicable law, the jury deliberated for seven hours and returned a verdict in favor of the plaintiff based on the record submitted during the trial of the case.

The plaintiff seeks to set aside the judgment entered in accordance with the plaintiff's motion for a directed verdict. The thrust of the motion is to have the judgment set aside notwithstanding the jury verdict and for the court to enter judgment in behalf of the plaintiff, Dorman Young, in the sum of \$186,203.24.

The defendants have filed a response to the motion of the plaintiff and insists that there was substantial evidence presented during the course of the trial as to the

value of the property involved which was destroyed by fire. The defendants further contend that to set aside or modify the verdict of the jury would be to invade the province of the jury with respect to their consideration of the evidence as to damages and to interpose the Court's views on the jury's findings regarding the relationship between the named insureds.

The plaintiff contends that in addition to the Arkansas law requiring a modification of the jury verdict, that the Court's instructions to the jury were inappropriate and thus requiring the action as requested notwithstanding the jury verdict. At the time the case was submitted to the jury no objections were made on behalf of plaintiff, Dorman Young, as to the Court's instructions or forms of verdicts submitted to the jury for their convenience.

The case was well tried by the presentation of substantial testimony on behalf of both parties. The court attempted to instruct the jury as to the applicable law by which the jury would be guided in its deliberations.

The Court observed the proceedings very carefully and concludes that the jury was properly instructed and that there was substantial evidence to justify the verdict of the jury and that the motion to set aside the jury verdict and render a modified judgment in behalf of the plaintiff, Dorman Young, should be denied.

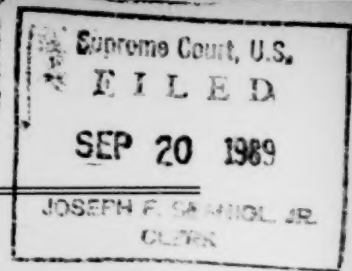
IT IS, THEREFORE, ORDERED AND ADJUDGED that the motion filed in behalf of the separate plaintiff, Dorman Young d/b/a Tiffany's, to set aside the verdict of the jury and enter judgment for separate plaintiff in the sum of \$186,203.24, as stated above herein, be and the same is hereby denied.

DATED this 13th day of September, 1988.

/s/ Oren Harris  
OREN HARRIS  
United States Senior District Judge



(2)  
No. 89-326



In The  
**Supreme Court of the United States**  
October Term, 1989

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DORMAN O. YOUNG d/b/a TIFFANY's,  
*Petitioner,*  
vs.

MT. HAWLEY INSURANCE COMPANY and  
ST. KATHERINE INSURANCE COMPANY, PLC,  
*Respondents.*

---

On The Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit

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**RESPONDENTS' BRIEF IN OPPOSITION**

---

D. MICHAEL HUCKABAY\*  
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*Counsel for Respondents*

\*Counsel of Record



QUESTIONS PRESENTED

I.

WHETHER JURISDICTION FOR WRIT OF CERTIORARI IS PROPER UNDER 28 U.S.C. SECTION 1254(1).

II.

WHETHER THE UNITED STATES COURT OF APPEALS WAS CORRECT IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

## LIST OF PARTIES

Petitioner is Dorman O. Young. He is an individual residing in Hot Springs, Garland County, Arkansas. Petitioner and Joe Noga were named insureds on a policy of insurance issued by the Respondents in the names of Dorman Young and Joe Noga d/b/a Tiffany's and further naming W.R.M., Inc., as the Mortgagee.

Respondents are foreign corporations authorized to do business in the State of Arkansas, namely, Mt. Hawley Insurance Company, a Delaware Corporation, and St. Katherine Insurance Company, P.L.C., a Corporation of London, England.

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MT. HAWLEY INSURANCE COMPANY and  
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*Respondents.*

---

**On The Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit**

---

**RESPONDENTS' BRIEF IN OPPOSITION**

---

The Respondents, Mt. Hawley Insurance Company and St. Katherine Insurance Company, PLC, respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

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### OPINIONS BELOW

The pertinent opinions below are included in the Petitioner's Appendix. The Opinion of the United States Court of Appeals for the Eighth Circuit, affirming the District Court, is also included in the Petitioner's Appendix, Pages A1 and A2.

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 25, 1989. A Petition for Rehearing was denied on May 30, 1989.

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### JURISDICTION

Petitioner alleges jurisdiction of the United States Supreme Court under 28 U.S.C. Section 1254(1).

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### STATUTES INVOLVED

Ark. Code Ann. Section 23-79-104, provides that no contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured at the time of the effectuation of the insurance and at the time of the loss.

Additionally, the provision defines "insurable interest" as any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, pecuniary damage or impairment.

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## REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because this matter does not involve a question of gravity and general importance, there being no conflict between decisions of State and Federal Courts, or between those Federal Courts of different circuits, and does not affect international relations. Additionally, Petitioner seeks a Writ of Certiorari to review the evidence, discuss specific facts and to review the decision of the United States Court of Appeals for the Eighth Circuit, based solely on questions of fact. Petitioner seeks review of the Court of Appeals for the Eighth Circuit's Opinion affirming the denial of Petitioner's Post-Trial Motion for Judgment Notwithstanding the Verdict. A request for such relief lies within the sound discretion of the trial court and the Court of Appeal's opinion that the District Court did not abuse its discretion by denying relief to the Petitioner should not be disturbed.

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## STATEMENT OF THE CASE

This is a civil action filed in the United States District Court, Western District of Arkansas, Hot Springs Division, with federal jurisdiction based on 28 U.S.C. Section 1332, on the complete diversity of citizenship of the parties and amounts in controversy in excess of \$10,000. Respondents issued a policy of insurance in the names of Dorman Young and Joe Noga d/b/a Tiffany's and further named WRM, Inc., as the Mortgagee. The insurance policy covered a business known as Tiffany's Restaurant in

Hot Springs, Arkansas, that was totally destroyed by fire on May 29, 1986.

Pursuant to the terms and conditions of the policy of insurance, Respondents paid the mortgagee, WRM, Inc., the balance of the mortgage and denied Petitioner's claim for proceeds under the policy, pleading affirmatively that the fire was intentionally set by or at the direction of the named insureds, Dorman Young and/or Joe Noga, and also pleading misrepresentation.

The Petitioner, Dorman Young d/b/a Tiffany's, filed suit against the Respondents for the proceeds due under the policy of insurance, claiming that he was entitled to the full proceeds due under the policy of insurance. Pursuant to an Order of the trial court, Joe Noga was made an indispensable party to the litigation as his name appeared on the policy of insurance as a named insured and he had an insurable interest. Ark. Code Ann. Section 23-79-104. At the trial, the jury was requested to determine the damages sustained by Dorman Young *only*.

The Petitioner, Dorman Young, was awarded a jury verdict of \$102,000, and on August 18, 1988, the District Court entered judgment on the jury verdict. Petitioner filed a Motion for Judgment Notwithstanding the Verdict to increase the jury award. The District Court denied the Motion and Petitioner filed an appeal from the denial of same. On April 25, 1989, the United States Court of Appeals for the Eighth Circuit issued an Opinion affirming the District Court's entry of judgment on the jury verdict and denying the Petitioner's Motion for Judgment Notwithstanding the Verdict. Petitioner's Petition for Rehearing was denied on May 30, 1989.

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## ARGUMENT

Petitioner has now filed a Petition for Writ of Certiorari before this Court, alleging that the United States Court of Appeals for the Eighth Circuit erred in its decision in upholding the trial court's denial of Petitioner's Motion for Judgment Notwithstanding the Verdict. At trial, there was substantial evidence presented as to the business relationship between Petitioner and Joe Noga. This testimony included the evidence of partnership, financial investment, financial contributions made during the course of the business relationship, and Petitioner's and Mr. Noga's contribution in terms of man hours and cash in the operation of the business, and as to the amounts of money which Petitioner has personally invested in the business, including monies personally loaned by Joe Noga to the Petitioner. At the trial of this matter, both Petitioner and Respondents presented evidence as to the value of the business contents and as to contributions made to the business by the named insureds. Both Petitioner and Mr. Noga were named insureds on the policy of insurance and had an "insurable interest" in the subject property as that term is defined in Ark. Code Ann. Section 23-79-104.

Further, following the jury trial of this matter, Interrogatory No. 4 was returned in favor of the Petitioner in the amount of \$102,000. The applicable verdict form submitted, without objection from counsel for Petitioner, stated as follows:

"Interrogatory No. 4 - If you should find in favor of the Plaintiff, Dorman Young, on the insurance policy, state the amount of damages,

if any, which you find were sustained by Dorman Young as a result of the occurrence."

A line was provided with a dollar sign (\$) and a signature line was also present for the foreman's signature. No objections were raised by counsel for Petitioner as to the instructions or as to the proposed Verdict Form at any time during the course of the trial or after the jury had returned its verdict. Additionally, counsel for Petitioner made no request to poll the jury when the verdict was returned nor was the issue of an inconsistent verdict ever raised by counsel for Petitioner. Accordingly, the judgment entered in this case allowed a recovery only on behalf of Petitioner, Dorman Young. Interrogatory No. 4, the damages interrogatory, requested that the jury return damages for Dorman Young only.

Petitioner seeks to have this Court review the denial of Judgment Notwithstanding the Verdict by alleging that its Motion for Directed Verdict should have been granted. The only question raised on appeal was whether there was substantial evidence to support the verdict of the jury.

In determining whether the trial court erred in denying a Motion for Judgment Notwithstanding the Verdict, the Court does not pass on the credibility of the witnesses nor weigh the evidence to determine whether the preponderance of the evidence is supported by the jury's findings. The Court is to consider only that evidence favorable to the Appellee, is required to review Appellee's testimony in that light, and is to draw all reasonable inferences favorable to the verdict. It is long standing law that a directed verdict is proper only when no issues of fact exist, and on appeal, the Court determines whether a

fact issue existed by examining the evidence in the light most favorable to Appellee and will affirm that there is substantial evidence to support the verdict. Petitioner seeks to invade the province of the jury by alleging that there was "undisputed evidence" as to damages. Respondents submit that damages were vehemently controverted at trial. The case law is clear that if there is any evidence in favor of a party against whom a directed verdict is sought, it is error for the Court to take the matter from the jury. Petitioner now states that the Court of Appeals based its decision on the erroneous premise that it failed to move for a directed verdict and that the Court of Appeals never reached the merits of Petitioner's Motion for Judgment Notwithstanding the Verdict.

Petitioner did not certify the portion of the transcript containing his oral Motion for Directed Verdict to the United States Court of Appeals and that issue is not presently before the Court. Even if the record had been fully abstracted, it is readily apparent that the trial court denied Petitioner's Motion for Directed Verdict at time of trial and that there was a sound basis for doing so.

Petitioner states that the damages question is one of law and due to the "undisputed facts" at trial, he was entitled to a directed verdict. To the contrary, this case stands for nothing more than a jury's assessment of damages to the only person they were asked to assess damages. At trial, there was testimony regarding both of the named insureds, Petitioner's and Joe Noga's contributions to the business, and the jury's assessment of damages cannot be attributed to simply real property. The question was whether there was substantial evidence to

support the jury's verdict for Petitioner which both the trial court and Court of Appeals concluded properly.

This is simply a case of a disappointed Plaintiff. Certiorari to review judgment should be granted only because of a federal question or the importance of a question involved, such as a conflict of opinion between the states, or issues of importance to the public as distinguished from that of a private party. *NLRB vs. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951). *Pflueger vs. Sherman*, 293 U.S. 55 (1934); *United States vs. Johnston*, 268 U.S. 220 (1925); *Fields vs. United States*, 205 U.S. 292 (1907). The Petitioner alleges that Writ of Certiorari should be granted to review the evidence and specific facts presented at the trial court. Respondents submit that this is not a proper matter for Writ of Certiorari in that a Motion for Directed Verdict and denial of a Motion for Judgment Notwithstanding the Verdict lies within the sound discretion of the trial court and is not a matter to be reversed on appeal absent a finding that the trial court abused its discretion in denying the Motion.

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**CONCLUSION**

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

*Mt. Hawley Insurance Company  
and St. Katherine Insurance  
Company, PLC, Respondents*

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